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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

Before The Honorable Vince Chhabria, Judge

YURI OSBORNE,)	
)	
Plaintiff,)	
)	
VS.)	NO. C 15-02653 VC
)	
KRAFT FOODS GROUP, INC.,)	
)	
Defendant.)	
_____)	

San Francisco, California
Thursday, October 15, 2015

TRANSCRIPT OF PROCEEDINGS

APPEARANCES:

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Reported By: Rhonda L. Aquilina, CSR #9956, RMR, CRR
Official Court Reporter

Thursday - October 15, 2015

10:47 a.m.

P R O C E E D I N G S

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THE CLERK: Calling Case No. 15-CV-2653, Osborne
versus Kraft Foods Group, Inc.

Counsel, please step forward and make your appearances for
the record.

MR. LOPATIN: Good morning, Your Honor. Benjamin
Lopatin for plaintiff Yuri Osborne.

THE COURT: Good morning.

MS. LIN: Good morning, Your Honor. Jill Lin for
plaintiff Osborne.

THE COURT: Good morning.

MR. LEE: Good morning, Your Honor. Kenneth Lee on
behalf of defendant Kraft Heinz Company.

THE COURT: Good morning. So for this case, really,
the only question to me is whether this should be dismissed
with prejudice or without prejudice. With respect to *all*
natural -- excuse me.

With respect to *natural flavor*, it's clear that the
complaint doesn't allege enough, so at a minimum it has to be
dismissed without prejudice. And in particular -- I'm looking
for the applicable regulation here -- I mean, what is it -- so
the question is what further can you allege about the natural
flavor ingredient? Capri Sun's use of the *natural flavor*

1 ingredient that would allow you to state a claim that its use
2 of the natural flavor ingredient renders the label "all
3 natural" misleading?

4 **MR. LOPATIN:** Thank you, Your Honor.

5 And I'll be honest, the *natural flavor* ingredient isn't
6 the main ingredient cause in this case, it's really the citric
7 acid.

8 But, with the *natural flavor* ingredient in a similar case
9 that I did before --

10 **THE COURT:** The only thing I'm asking is what --
11 clearly, there's no question that there's like nothing in your
12 complaint, and it's totally inadequate, so the only question is
13 what allegations could you add about natural -- now is your
14 chance if you want to continue to pursue that claim, and it
15 sounds like maybe you don't, and if you don't, just be candid
16 about it, and we'll be done, and we can move on. But what else
17 could you allege about their use of the *natural flavor* that
18 would allow you to state a claim?

19 **MR. LOPATIN:** And Your Honor, I'm sure with additional
20 research and investigation there's more I could allege. But in
21 full candor to the Court, if the Court is totally against it, I
22 would be willing to proceed just with the citric acid
23 ingredient.

24 **THE COURT:** I'm not against it or for it, but now is
25 your chance to include -- to explain what allegations you would

1 add to state a claim. It sounds like you're not able to do
2 that.

3 **MR. LOPATIN:** Well, I would like the opportunity in an
4 amended pleading to do so, and to go through and see if I could
5 add it if it makes sense, and then make that determination.
6 But I -- at least with the complaint we've set forth, I believe
7 we've at least alleged enough to get past the motion to
8 dismiss, but I'd be happy to readdress those issues and put in
9 some further allegations if the Court wants. If the Court --

10 **THE COURT:** Okay. Again, I'll -- just so it's clear
11 for the record. I'll ask the question one more time.

12 What additional allegations could you make about Capri
13 Sun's use or Kraft's use of *natural flavor* in order to state a
14 claim?

15 **MR. LOPATIN:** Well, really just that the *natural*
16 *flavor* ingredient isn't all natural. And at this stage, I
17 don't have any evidence to necessarily prove that, which I
18 would have to obtain through discovery.

19 Just, you know, in a similar case, Judge Orrick did a lot
20 of *natural flavor* ingredient to go past the motion to dismiss,
21 so it would be more of an issue of summary judgment. *Bohac -v-*
22 *General Mills* was the case that was involved in.

23 So I believe that we could allege facts that would allow
24 us to proceed with that claim, and I'd be happy to address that
25 in an amended pleading. But like I said, the citric acid is

1 our main ingredient.

2 **THE COURT:** Okay. So with respect to citric acid, it
3 seems like -- I mean, let me ask you a clarification question.

4 Is it your position -- I mean, I can't tell this quite
5 from the complaint. Is it your position that citric acid is
6 always unnatural?

7 **MR. LOPATIN:** No, your Honor.

8 **THE COURT:** Okay.

9 **MR. LOPATIN:** Basically the law is that citric acid is
10 allowed to be organic if it's naturally derived. We have
11 nothing here that states that the citric acid in the subject
12 product is naturally derived.

13 **THE COURT:** But wait a minute. You just said we have
14 nothing that states -- we have nothing here that states that
15 the citric acid is naturally derived. You're putting the
16 burden on them. I mean, you have a pleading burden at the
17 complaint stage. You can't just file a lawsuit without having
18 actual reason to believe that the ingredient is not all natural
19 and then say I need to do discovery to see if my guess is
20 correct.

21 So what -- so the problem that I have with your complaint
22 is that you complain a lot about citric acid generally in the
23 complaint, but you don't really have any -- you don't really
24 specify whether all -- in the complaint, you don't really
25 specify whether all citric acid is unnatural or some types of

1 citric acid is unnatural, and you don't specify what type of
2 citric acid Kraft uses in its Capri Sun drinks.

3 **MR. LOPATIN:** Yes, Your Honor. And I believe in our
4 investigation and facts are that the majority of citric acid is
5 unnatural; it's derived from a corn-based ingredient, which is
6 grown from GMOs.

7 And the reason why I brought up the product being
8 naturally derived is because in defendant's response, they --
9 or defendant's motion, they discuss that, well, it's considered
10 organic, so it has to be natural. So I believe that argument
11 is really incorrect, because it does not say citric acid
12 naturally derived. There's nothing in any literature, so it
13 tends to make me believe that it is unnaturally derived, and
14 they're concealing that fact on that.

15 **THE COURT:** So I'm looking at 21 C.F.R. 184.1033, and
16 it says: (reading) Citric acid is the compound of blah, blah,
17 blah, blah, blah. It is a naturally-occurring constituent of
18 plant and animal tissues. So that is not -- that's not the
19 regulation relating to whether something is organic or not.
20 We'll get to that regulation.

21 But you -- like I said, I have a complaint in front of me
22 that -- it's actually not in front of me. Let me get it in
23 front of me. I have a complaint in front of me that complains
24 a lot about citric acid generally and asserts generally that
25 citric acid is not natural. It doesn't say anything about --

1 it doesn't distinguish between different kinds of citric acid,
2 and it doesn't say anything about what kind of citric acid
3 Kraft uses. And then I have a regulation here which says that
4 citric acid is a naturally-occurring constituent of plant and
5 animal tissues. I mean, what am I supposed to do with that?

6 In light of that, like how can you state a claim that the
7 product -- again, same question. It seems to me that what I
8 just described about your complaint doesn't state a claim, that
9 Kraft uses a type of citric acid that is not natural which
10 renders the label *all natural* misleading. So what could you
11 do -- what allegations could you add to the complaint to state
12 a claim that the citric acid that Kraft uses in its Capri Sun
13 drinks renders the label *all natural* misleading.

14 **MR. LOPATIN:** Well, Your Honor, we would address the
15 concerns that you just raised as far as specifying why the
16 citric acid in this particular product is unnatural --

17 **THE COURT:** Okay. Why? Why don't you tell me? Tell
18 me what you would allege.

19 **MR. LOPATIN:** We would allege that it isn't natural,
20 and I would have to allege facts to support that.

21 **THE COURT:** And what would those facts be?

22 **MR. LOPATIN:** I would like an opportunity to put those
23 in an amended complaint, Your Honor. I would have to do
24 further investigation and to really almost do a pre-discovery
25 investigation to identify the exact origin of citric acid,

1 where it's from, and I believe that's kind of a higher burden
2 than what we're really subject to. I believe that citric acid
3 is known to be an unnatural ingredient. There are many cases
4 that have addressed it and allowed it to go past motions to
5 dismiss by merely alleging that it's unnatural. And we would
6 like the opportunity to conduct discovery to say exactly which
7 type of citric acid is in these products, whether it's the same
8 citric acid in all of them.

9 **THE COURT:** So you want to conduct discovery to try
10 and figure out whether it's natural citric acid or unnatural
11 citric acid?

12 **MR. LOPATIN:** No, your Honor. We're under the
13 assumption and presumption that it is unnatural.

14 **THE COURT:** Okay. And why are you under the
15 presumption that it's unnatural? What facts do you have to
16 support that presumption?

17 **MR. LOPATIN:** The facts that the majority of citric
18 acid is unnatural, as -- and that --

19 **THE COURT:** And where do you get that from? That's
20 not in -- I don't think that's in your complaint.

21 **MR. LOPATIN:** Well, we briefly touched on that
22 subject, but I'd like the opportunity to amend the complaint to
23 further address that fully, fully address all the Court's
24 concerns, and I believe I'd be able to do so in an amended
25 pleading in not very much time.

1 **THE COURT:** Another question I have for you, and this
2 is an argument that the defendants did not make. They made the
3 general argument that because citric acid is allowed in organic
4 products, by definition it should be considered also natural.
5 And I think that argument -- that's sort of a boilerplate
6 argument that's made in these food labeling cases, and I think
7 that's wrong. That's not right. There can be synthetic
8 products in organic products, and so to say that by definition
9 because it's allowed in an organic product it must be natural
10 is just not correct, and I've rejected that argument before.

11 But I was looking at the regulation, and it seems to me
12 they have another potentially pretty good argument that they
13 didn't make, and it's more specific to the issue of citric
14 acid. And 7 C.F.R. 205.605 says -- it says: (reading) The
15 following non-agricultural substances may be used as
16 ingredients in products labeled as organic, and then it has two
17 different categories of substances: One is synthetic
18 substances, and the other is non-synthetic substances. And it
19 has a long list of synthetic substances, and it has a long list
20 of non-synthetic substances, and one of the non-synthetic
21 substances is citric acid produced by microbial fermentation of
22 carbohydrate substances.

23 Is this citric acid that Kraft uses - citric acid produced
24 by microbial fermentation of carbohydrate substances?

25 **MR. LOPATIN:** Your Honor, I have that regulation right

1 in front of me, and we don't -- at this point I honestly can't
2 tell you yes or no to that question. I don't know if it's
3 produced by microbial fermentation of carbohydrate substances.

4 **THE COURT:** Well, if it were citric acid produced by
5 microbial fermentation of carbohydrate substances, whatever
6 that means, it seems like by definition under the USDA's
7 regulations it is non-synthetic.

8 **MR. LOPATIN:** Well, Your Honor --

9 **THE COURT:** And you're whole beef is that it's
10 synthetic; right?

11 **MR. LOPATIN:** Synthetic, artificial, possibly
12 genetically modified. But if that were the case, why would
13 they label it *organic* under this section as opposed to "all
14 natural"? I think it's really just something that results in
15 reasonable consumers --

16 **THE COURT:** Because maybe the *natural flavor* is not
17 organic. I mean, I presume that they can't label it organic
18 because the natural flavor is not organic or maybe the fruit
19 from which the juice comes is not organically grown. I don't
20 know, but that's neither here nor there.

21 **MR. LOPATIN:** Well, Your Honor, I --

22 **THE COURT:** The question is whether the citric acid is
23 natural or whether it's not natural in a way that would prevent
24 them from labeling their product *all natural*, and it seems like
25 you're just totally unable to say anything about that.

1 **MR. LOPATIN:** No. I mean, I could go through the
2 complaint if you'd like. But I believe, as far as specifying
3 exactly what type of citric acid is in there and why, you know,
4 I'd be able to address those through an amended pleading. As
5 it states right now, we believe the allegations in the
6 complaint are sufficient.

7 And as far as, you know, being at the motion to dismiss
8 stage, this district has previously declined to dismiss claims
9 asserting citric acid is an unnatural ingredient in the case
10 *Gitson versus Trader Joe's*, you know --

11 **THE COURT:** I'm familiar with that case. That case
12 has now been assigned to me.

13 **MR. LOPATIN:** Oh, very good.

14 **THE COURT:** Although it was Judge Orrick who -- and
15 that was one sentence in passing in his ruling on a multi-issue
16 motion to dismiss. So I'm not sure -- I'm not familiar with
17 the allegations in that case, but I am familiar with the
18 allegations in your complaint, and that's what's important
19 here.

20 And, you know, I wonder if you've created a bit of a Rule
21 11 problem for yourself, because it seems to me that what you
22 have done is sort of said *I'm going to file a lawsuit and then*
23 *ask questions later*; right? It seems to me that you do not
24 know -- you actually don't know whether the natural flavor is
25 unnatural or not. You actually have no idea, but you filed a

1 lawsuit on it. And it seems, I mean, it's sort of less clear
2 in the citric acid context, but it seems like you have no idea
3 whether Kraft's citric acid that it uses in Capri Sun is
4 natural or not, but you filed a lawsuit anyway. And like isn't
5 that a Rule 11 problem? I mean, you have to have, you know, a
6 basis for believing your allegations, and it seems like you
7 simply didn't do any investigation before filing the lawsuit.

8 **MR. LOPATIN:** No. Actually, Your Honor, we did. And
9 I've been doing these cases for years, and the majority of
10 citric acid in the marketplace is unnatural, and I can cite to
11 you specific scientific articles relating to that, and those
12 are the things that I relied on. And possibly I didn't --

13 **THE COURT:** But you didn't cite -- you didn't say any
14 of that in your complaint.

15 **MR. LOPATIN:** Right, your Honor. And I would address
16 that in an amended pleading and put all of that science in
17 there. It's something I put in previous complaints, and I
18 might have put it all in here.

19 **THE COURT:** And I'll think about whether to give -- I
20 mean, my inclination, I'll let you chime in for a minute if you
21 want, but my inclination is to give you leave to amend the
22 citric acid claim. I'm not so sure about the natural flavor
23 claim. But even if I were to give you leave to amend the
24 natural flavor claim, I think you have to give some serious
25 thought to Rule 11 before you amend either claim, before you

1 continue to pursue either claim, because I think you're sort of
2 stepping into Rule 11 territory.

3 **MR. LOPATIN:** Okay. Thank you, Your Honor.

4 **THE COURT:** Do you want to briefly add anything?

5 **MR. LEE:** One small point, Your Honor. We would ask
6 that you dismiss it with prejudice. I think here it's a little
7 bit different from some other cases where courts have said
8 plaintiffs haven't met the burden, and defendants don't have
9 the burden.

10 Here, I think Your Honor, as Your Honor pointed, there are
11 a lot of governmental regulations from the United States
12 Government saying citric acid is described as a
13 naturally-occurring constituent of plant and animal tissues,
14 the organic regulations describing it as non-synthetic. So
15 here I think the Government has every scope on this, so I think
16 it's slightly different from other cases where courts have
17 given leave to amend.

18 **THE COURT:** But what about the regulation that I just
19 pointed to, the one about organic substances? I mean, it says,
20 (reading) citric acid produced by microbial fermentation of
21 carbohydrate substances. I mean, do we know from the complaint
22 whether -- and we have to believe the complaint at this point.
23 Do we know from the complaint that the citric acid that Kraft
24 uses in the Capri Sun juices fit that definition?

25 **MR. LEE:** I believe so, Your Honor. In the complaint

1 they allege -- paragraph 35 says (reading) citric acid is
2 made -- they use the word -- synthetically by the fermentation
3 of glucose. And I believe, if I recall my science from high
4 school, I believe glucose is a carbohydrate, so I think that's
5 what they're referring to.

6 And if we accept the allegations made in the complaint
7 that citric acid is made by fermentation of glucose, and that
8 fits under the governmental definition of citric acid, natural
9 citric acid.

10 **THE COURT:** Um-hm. And I guess the implication from
11 that paragraph is that even though they don't actually say it,
12 they are intending to allege that your citric acid is made
13 by -- synthetically by the fermentation of glucose.

14 **MR. LEE:** Yes, Your Honor.

15 **THE COURT:** Well, it seems to me that one of the
16 things that would need to happen in an amended complaint with
17 respect to citric acid is an explanation of why the citric acid
18 that Kraft uses in these juices don't fit within the definition
19 of citric acid, non-synthetic citric acid within the meaning of
20 this regulation. That's, I suppose, an issue that we can
21 discuss another time if I decide to grant leave to amend, which
22 I will think about.

23 Meanwhile, I'm staring at that tasty-looking Capri Sun
24 drink that you have on your podium. It makes me thirsty. I'm
25 going to get some water. I was going to ask for that, but --

1 **MR. LOPATIN:** I usually try to bring them --

2 **THE COURT:** It would probably be inappropriate.

3 (Laughter)

4 **THE COURT:** Okay. Thank you.

5 **MR. LOPATIN:** Thank you, Your Honor.

6 **MR. LEE:** Thank you, Your Honor.

7 (Proceedings adjourned at 11:08 a.m.)

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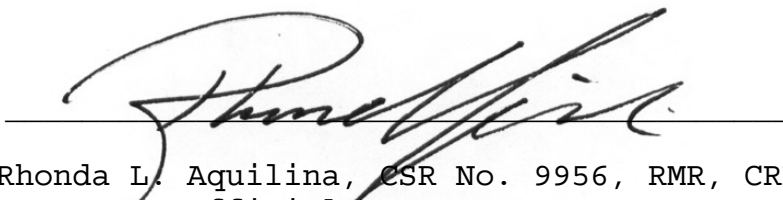
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CERTIFICATE OF REPORTER

I certify that the foregoing is a correct transcript
from the record of proceedings in the above-entitled matter.

DATE: Monday, November 9, 2015



Rhonda L. Aquilina, CSR No. 9956, RMR, CRR
Official Court Reporter